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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-324 ~~1869~~

GLENN MATHIS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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To the Chief Justice and the Associate Justices of the Supreme Court of The United States:

Your petitioner, Glenn Mathis, hereby petitiones for a writ of certiorari to review the decision of the Supreme Court of the State of Arkansas entered on March 29, 1971 affirming his conviction of the crime of burglary and grand larceny despite the conviction being based upon evidence obtained as the result of a constitutionally illegal search and seizure when arrested without probable cause.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at: *Mathis* v. *State,* 249 Ark. 1088, 464 S.W. 2d 49 (1971). A copy of the opinion is printed in Appendix "A" to this petition.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on February 22, 1971. That Court entered final judgment upon denying rehearing March 29, 1971, a copy of which is printed in Appendix "B". The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257 (3).

To comply with Rule 23 (1) (F) of this Court, we submit the following account of how the federal question herein presented was raised.

The question of the arrest of the defendant without probable cause in violation of his rights under the Constitution of the United States and of the Constitution of the State of Arkansas were presented and raised in the appeal to the Supreme Court of Arkansas, and was discussed in that Court's opinion affirming petitioner's conviction in Appendix "A".

QUESTION PRESENTED

1. Whether petitioner's arrest by the Little Rock Police on May 24, 1968 was based on probable cause, and if not, whether the search and seizure incident to that arrest were also illegal, thereby preventing the use of the fruits thereof as evidence at petitioner's trial on June 17, 1970.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 4 TO U.S. CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14 (1) TO U.S. CONSTITUTION:

* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE.

Petitioner and two other men were stopped by members of the Little Rock Police Department while driving down the street (R.25, 26). Petitioner was in the back seat. All three were placed under arrest for investigation of burglary (R.27). The officers did not state why they stopped the occupants of the car. The officers testified they found a quantity of change in the back seat of the car but failed to produce it at the trial over petitioner's objections (R.27, 28).

The trial court allowed the owner of a service station to testify that a screw driver taken from him in a burglary of his station was found in the car petitioner was in but did not produce it in court over petitioner's objections (R.33, 34).

The Arkansas Supreme Court affirmed petitioners conviction by holding that petitioner's contention that he was arrested without probable cause was not made in the lower court (Appendix "A").

REASONS FOR GRANTING THE WRIT

Petitioner, Glenn Mathis, submits that there is one important reason for the granting of the writ prayed for, namely, that the decision of the Supreme Court of Arkansas in the instant case below is not in accord with the applicable decisions of this Court in refusing to reverse petitioner's conviction when he was arrested without probable cause and without a warrant.

When an arrest without warrant is made for an offense not committed in the presence of the person arresting, the latter's good faith is not enough. He must

have a real belief that the person to be arrested is guilty of a felony, and that belief must be based upon reasonable grounds. Probable cause to believe that a felony has been committed is not enough, without probable cause to believe that the person to be arrested is the guilty party. Mere suspicion is not enough to constitute probable cause for arrest without a warrant, expecially if it is mere general suspicion.

In *Beck* v. *Ohio,* 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964), this Court held that:

> "Whether an arrest without warrant is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it, that is, whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudentman in believing that the suspect had committed or was committing an offense".

The only factual difference in this case and that of *Davis* v. *Mississippi,* 394 U.S. 721 (1969), is in the present case the petitioner was arrested for "investigation of burglary" (R.27) and the coins alleged to be from the service station were found but never presented at trial while in the Davis case, supra, fingerprints were taken while he was questioned briefly.

The Beck case, supra, was cited in the Alabama case of *White* v. *State,* 221 So. 2d 117 (1969), which held that arrest of defendant for "investigation" while defendant was walking up highway after officer had seen defendant at spot where he had arrested other persons who had allegedly taken gas and cigarettes without paying for them was an unlawful arrest and subsequent search of

defendant's person at city hall in absence of search warrant was improper.

In *Morales* v. *New York*, 396 U.S. 102 (1969), this Court remanded a state court judgment for further proceedings on the issue whether the defendant's confessions were the inadmissible fruits of his illegal detention by police officers where no challenge to the lawfulness of such detention having been raised until the case came to the state's highest court.

Petitioner's contention that the officers did not have probable cause to arrest him because he was not violating the law nor was he suspected of violating the law when stopped by the police officers is similar to *Whiteley* v. *Warden*, ... U.S. ....., 28 L. Ed. 2d 306, 91 S. Ct. ..... (1971) decided by this Court on March 29, 1971 in which it was held that since the complaint on which the warrant was issued could not support a finding of probable cause, and since the arresting officer did not possess any factual data tending to corroborate the informer's tip that the petitioner and the other person had committed the crime, the petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments, and the evidence secured as an incident to the arrest should have been excluded from the trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 5550

Opinion Delivered February 22, 1971

GLENN MATHIS *Appellant*

v.

STATE OF ARKANSAS *Appellee*

Appeal from Pulaski Circuit Court
William J. Kirby, Judge
Affirmed
Carlton Harris, Chief Justice

Glenn Mathis, appellant herein, was convicted of burglary and grand larceny in the Pulaski County Circuit Court and was sentenced to serve two years in the State Penitentiary. Evidence on the part of the state reflected that Officer F. M. Elton of the Little Rock Police Department, on May 24, 1968, while patroling the area around Eleventh and Bond Street, noticed that the light was turned off at Buddy Brothers DX Service Station. Investigation revealed that the back window had been broken open, the cigarette machine also broken open, and the telephone had been torn from the wall. Subsequent investigation by Little Rock officers revealed that some tools had also been taken from the service station. On the same night that the burglary occurred, Little Rock officers stopped an automobile occupied by three persons, including Mathis. Mathis was sitting in the rear seat. Officer Larry Starks testified that he told appellant to get out of the car, and noticed at the same time that Mathis was emptying his pockets of change. According

to Starks, both pockets were full of change, and the total amount recovered (from appellant's pockets and off the back floor) was $45.05. There were also tools visible which were lying on the floor, a wrench and a long screw driver, the screw driver having a yellow handle with blue paint on the end of it. Buddy Brothers identified some of the tools as belonging to him, stating "They called me over there early in the morning and discovered it all broke, tools gone and asked me if I could identify this big screw driver and I said sure, we got a special blue DX paint that I dip them in and which is easy to identify, and I had worked with the tools for about, some of them, fifteen years". This was the evidence offered by the state at the trial, and from the judgment entered, appellant brings this appeal. For reversal, it is first asserted that Mathis was arrested without probable cause, and it is then urged that the evidence was insufficient to support the verdict.

Mathis, who denied having both pockets full of change, and denied dumping change out of his pockets as he prepared to get out of the car, testified that he, with the two others in the automobile, had been drinking at the Executive Club and were on their way to the 609 Club at the time of the arrest. He said no traffic laws were being violated, and that no search warrant was exhibited at the time the car was stopped and the arrest made.

The short answer to appellant's first contention (that he was arrested without probable cause in violation of his rights under the Constitution of the United States and of the State of Arkansas) is that we cannot consider it since the contention was not made in the court below. We have consistently held that a point cannot be raised on appeal unless timely objection was made at the trial below. *Bivens* v. *State*, 242 Ark. 362, 413 S.W. 2d 653.

and cases cited therein. The record does not reveal that appellant, at any time, either before or during the trial, ever asserted or argued that the arrest was made without probable cause. It follows that there is no merit in this contention.

As to the second point, we have already related the facts upon which the state relied. Of course, the evidence was circumstantial, but it was certainly sufficient to sustain the conviction. In *Scott* v. *State*, 180 Ark. 408, 21 S.W. 2d 186, we said:

> "The defendant was convicted on circumstantial evidence, but there is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and, if the jury believes from the circumstances introduced in evidence, beyond a reasonable doubt, that the defendant is guilty, it is the duty of the jury to find him guilty just as if the evidence was direct." [1]

When we consider that tools found in the car were identified by Brothers as belonging to him, that appellant's pockets, according to the officers, were full of change, and that he was trying to empty his pockets just prior to arrest, the state has shown strong circumstances of guilt. This is particularly true when we consider that Mathis, though testifying, gave no explanation of the large amount of change found in his pockets and on the back floor of the automobile. Appellant simply denied that he had any large amount of change in his pockets or that he dumped any on the floor. Accordingly, we have simply a matter of which witnesses the court chose to

believe. The evidence was sufficient to sustain the verdict.

Affirmed.

[1] In the case now before us, the trial was conducted by the court, sitting as a jury, but the rule, is of course, the same.

APPENDIX "B"

STATE OF ARKANSAS

In the Supreme Court SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, beginning the first Monday of October, A.D. 1970, amongst others were the following proceedings, to-wit:

On the 29th day of March, A.D. 1971, a day of said term

Glenn Mathis — Appellant.

v. No. 5550

The State of Arkansas — Appellee

Appeal from Pulaski Circuit Court

Petition on rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, This 10th day of June, A.D. 1971.

Jimmy H. Hawkins
Clerk

(Seal)